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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 761

WILLIS W. RITTER, Chief Judge, United States District Court for the District of Utah, *Petitioner*,

v.

THE UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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WILLIS W. RITTER, Chief Judge, United States District Court for the District of Utah, your petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered in the above-entitled case on December 8, 1959.

OPINIONS BELOW

The opinion of the Court of Appeals (Tr. 75-79;* Appendix A, *infra*, pp. 1a-4a) is reported at 273 F. 2d 30.

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* All "Tr." references are to the typewritten record of the present mandamus proceeding (No. 6238, C.A. 10).

The first opinion of the Court of Appeals in the underlying litigation is reported at 220 F. 2d 666. The opinion of this Court reversing the Court of Appeals on the issue of liability and remanding the case for further findings on the issue of damages is reported at 351 U.S. 173. The second opinion of the Court of Appeals in the underlying litigation (Tr. 14-20), following a second trial pursuant to this Court's remand, is reported at 257 F. 2d 920.

JURISDICTION

The judgment of the court below (Tr. 80; Appendix B, *infra*, page 4a) was entered on December 8, 1959. The jurisdiction of this Court is invoked under 28 U. S. C. §1254(1).

QUESTION PRESENTED

Whether a Court of Appeals may, by mandamus, order the disqualification of a regularly appointed and assigned District Judge, on the basis of his alleged bias and prejudice in a particular case, and assign another judge in his place, despite the fact that no affidavit of bias and prejudice has been filed by any of the parties to the case.

STATUTES INVOLVED

The statutory provisions involved are set forth in Appendix C, *infra*, pp. 4a-5a.

STATEMENT

This is a sequel to *Hatahley* v. *United States*, 351 U.S. 173, where this Court held the United States liable for depredations committed by its agents against the persons and livestock of a small band of Navajo Indians in the southeastern portion of the State of Utah. The essential facts are set forth at 351 U.S. at 174-177. Those pertinent to the present proceeding may be summarized as follows:

Hatahley *et als.*, Navajo Indians, brought suit under the Federal Tort Claims Act for damages resulting from the

wrongful taking and destruction of some 140 of their horses and burros by agents of the Bureau of Land Management, and for their mental pain and suffering. Trial before petitioner in the United States District Court for the District of Utah resulted in judgment for the plaintiffs in the sum of $100,000. On appeal, the Tenth Circuit reversed, directing entry of judgment for the United States on the ground that, by reason of asserted compliance with the Utah abandoned horse statute, the United States had incurred no liability in consequence of its agents' spoliation of the Indians. 220 F. 2d 666.

This Court granted certiorari (350 U.S. 817), after which the United States argued (U.S. Br., No. 231, Oct. T. 1955, pp. 14-20) that "The Court of Appeals correctly regarded the findings and decision of the District Court as being influenced by an unwarranted attitude of hostility to the Government's case."

This Court rejected that contention, saying (351 U.S. at 177, note 3):

> "While the Government does not challenge particular findings, it does level a general charge that the trial was conducted in such an atmosphere of bias and prejudice that no factual conclusions of the court should be relied on. The Court of Appeals noted 'that the case was tried in an atmosphere of maximum emotion and a minimum of judicial impartiality.' 220 F. 2d at 670. After oral argument and a thorough consideration of the record, however, we do not find that the trial was conducted so improperly as to vitiate these findings. See *Labor Board* v. *Donnelly Co.*, 330 U.S. 219, 236-237."

On the issue of liability, this Court reversed the Tenth Circuit, holding that the United States was liable for the torts of its agents; the case was remanded to the District Court for adequate and appropriate findings to permit proper apportionment of the lump sum judgment (351 U.S. at 182).

On such remand, the District Court took additional evidence on damages, made further detailed findings, and entered individual judgments, aggregating $186,017.50, in favor of the several plaintiffs. Again the United States appealed; again the Tenth Circuit reversed, this time remanding for a new trial, limited to the issue of damages, consistent with the opinion then rendered, 257 F. 2d 920. That opinion (Tr. 20; 257 F. 2d at 926) concluded by saying, "we suggest that when the case is remanded to the District Court, the Judge who entered the judgment take appropriate preliminary steps to the end that further proceedings in the case be had before another Judge." Certiorari was again sought; this time it was denied (358 U.S. 899; No. 420, Oct. T. 1958).

Thereafter, Hatahley *et als.*, plaintiffs, filed in the District Court a petition for the appointment of a special master (Tr. 33-37). The Government filed two motions, one (Tr. 23) asking that all further proceedings be heard before another judge, the other (Tr. 24) requesting the entry of an amended judgment (Tr. 25-26) that provided for the transfer of the case to another judge.

A hearing on all three applications was held on June 26, 1959 (Tr. 39-53). On August 24, 1959, petitioner denied the plaintiffs' petition (R. 38), and on September 10, 1959, petitioner denied both of the Government's motions (R. 27, 28).

Thereafter, on October 2, 1959, the United States filed in the Tenth Circuit a petition for writ of mandamus or prohibition (Tr. 4-13), duly accompanied by an application for leave to file (Tr. 2-3); the relief sought (Tr. 12-13) was that—

> "Chief Judge Willis W. Ritter be compelled to set aside his orders of September 10, 1959, denying the motion that all further proceedings be heard before another judge and denying the motion for entry of a judgment on the mandate; that a stay issue pro-

> hibiting him from setting the case for retrial before himself or under his control pending determination of this petition; and that he be directed to enter appropriate orders 'to the end that further proceedings in the case be had before another Judge,' "

citing *United States* v. *Hatahley*, 257 F. 2d at 926 (C.A. 10).

On December 8, 1959, the Tenth Circuit granted the mandamus, (Tr. 75-79), and directed that the *Hatahley* case "be heard before a judge to be designated by the Chief Judge of this Circuit, pursuant to Section 292(b), Title 28 U.S.C., and that the respondent take no further action herein" (Tr. 79). Judgment (Tr. 80) was entered accordingly.

The same four Circuit Judges who had heard the mandamus argued in the United States Court of Appeals for the Tenth Circuit (Tr. 74) assembled on the afternoon of that same day, following the argument, as the Judicial Council of the Tenth Circuit (Tr. 82). Sitting as such Judicial Council, the same judges considered all of the documents that had earlier that day been before them as the United States Court of Appeals (Tr. 82-83). On the same day that the Court of Appeals issued its opinion and judgment, viz., December 8, 1959, the Judicial Council made findings that petitioner was prejudiced in favor of the plaintiffs in *Hatahley et als.* v. *United States* and that "the effective and expeditious administration of the business" of the United States District Court for the District of Utah required that petitioner proceed no further in that case (Tr. 83).

The Judicial Council, purporting to act under 28 U.S.C. § 332, ordered petitioner to proceed no further in the *Hatahley* case, and then requested one of its members, Chief Judge Murrah of the Court of Appeals, to designate another judge to hear the case (Tr. 83-84).

Meanwhile, on the day before, December 7, 1959, Chief Judge Murrah had already assigned District Judge Kerr

of the United States District Court for the District of Wyoming to hear the *Hatahley* case. A copy of this order, separately certified, has been filed with the Clerk of this Court.

The orders of the Tenth Circuit and of the Judicial Council were both stayed until February 6, 1960 (Tr. 80, 85). After further stays were denied, Mr. Justice Whittaker on February 25, 1960, stayed all further proceedings in *Hatahley* v. *United States*, conditioned on the filing of a petition for certiorari in the present case on or before March 7, 1960.

This is that petition for a writ of certiorari, to review the judgment of the United States Court of Appeals in *United States* v. *Ritter*.

A motion for leave to file a petition for a common law writ of certiorari or in the alternative for a writ of mandamus, and a petition for a common law writ of certiorari or in the alternative for a writ of mandamus, are being filed contemporaneously herewith to review the order of the Judicial Council.

REASONS FOR GRANTING THE WRIT

When and how an appellate court may properly control the conduct of a trial judge through the use of the truly extraordinary writ of mandamus is obviously a question of continuing importance in the administration of justice. Numerous rulings here indicate that mandamus against a sitting judge is to be sparingly employed, not only because that writ has "the unfortunate consequence of making the judge a litigant, obliged to obtain personal counsel or to leave his defense to one of the litigants before him" (*Ex parte Fahey*, 332 U. S. 258, 260), but also because the issuance of that writ strikes at the basic federal policy of not permitting piecemeal appeals. Indeed, to the extent that Congress in 1958 ameliorated that policy to allow certain interlocutory appeals in a narrow class of cases and

under rigid restrictions, see 28 U.S.C. § 1292(b), the prior limited scope for mandamus against a judge was necessarily limited still further. Yet the court below, in an action literally without precedent, has sharply curtailed the traditional and indeed constitutionally guaranteed independence of a United States District Judge within his own district, and in the court wherein he was Chief Judge. We submit that its action should be reviewed by this Court.

First. No case of which we are aware even remotely authorizes a court of appeals to disqualify a trial judge in a situation such as this one. Certainly *LaBuy* v. *Howes Leather Co.*, 352 U.S. 249, on which the Tenth Circuit relied (Tr. 77, 78), did not go so far. There the district judge had abdicated his functions to a master, in the face of the Seventh Circuit's frequent disapproval of such a practice (see 352 U.S. at 258), in disregard of Rule 53(b), F. R. Civ. P., and contrary to this Court's condemnation in *Los Angeles Brush Co.* v. *James*, 272 U.S. 701, and in *McCullough* v. *Cosgrave*, 309 U.S. 634. Here, however, petitioner denied the Indian plaintiffs' application for reference to a master (Tr. 38), and, far from abdicating his functions, was preparing to act.

And, unlike *Cooke* v. *United States*, 267 U.S. 517, and *Offutt* v. *United States*, 348 U.S. 11—also relied upon by the court below (Tr. 20; 257 F. 2d at 926)—the present case involved no question of contempt, where the trial judge's vindication of the affront to his court might be thought to lessen his objectivity. The same factor—"that in sitting in judgment * * * the judge should not himself give vent to personal spleen or respond to a personal grievance" (*Offutt* v. *United States*, 348 U.S. at 14) was in substance present in *Calvaresi* v. *United States*, 348 U.S. 961, reversing 216 F. 2d 891 (C. A. 10), where this Court remanded the cases "for retrial before a different judge." The opinion below in that case plainly discloses those circumstances. (We reject, emphatically, the Gov-

ernment's all but *ad hominem* suggestion (Tr. 72) that the *per curiam* in *Calvaresi* is only to be read as applying to "other cases originally tried by Judge Ritter"—the present petitioner.)

Nor is this case like *Johnson* v. *Manhattan R. Co.*, 289 U.S. 479, where the Court's suggestion (289 U.S. at 505) that Senior Circuit Judge Manton withdraw from a receivership pending in a District Court was thereafter followed by an order of the Circuit Justice (Mr. Justice Stone) enjoining him from acting further. See 49 Law Library J. 6, note 36, ¶ (b). For while Judge Manton was virtually an interloper brushing aside one of the rules of the court in which he assigned himself to sit, this petitioner is a United States District Judge for the District of Utah by Presidential appointment, duly confirmed by the Senate, and now Senior Judge in that district by virtue of 28 U.S.C. § 136.

Second. The statutes governing the disqualification of sitting judges are explicit. Any party to a proceeding in a district court may by "timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias of prejudice against him or in favor of any adverse party" (28 U.S.C. § 144; *infra*, p. 4a) disqualify the sitting judge. And the sitting judge is directed by 28 U.S.C. § 455 (*infra*, p. 5a) to recuse himself in specified instances. No other authority exists for disqualifying a district judge. No authority for effecting such disqualification can be spelled out of the very specific statutory jurisdiction conferred on courts of appeals (28 U.S.C. §§ 1291, 1292, 2106), and none, we submit, can be found in the "all writs" provision, now 28 U.S.C. § 1651(a), *infra*, p. 5a.

If a party seeking to remove a judge from further participation in a particular cause lacks the facts—or the fortitude—to file a sufficient affidavit of prejudice under the statute specially designed for such removal, it should not be permitted to achieve the same result through like

allegations in unsworn briefs, much less in similarly unsworn applications for mandamus which short-circuit normal appellate processes.

For the rest, the tenure of a United States District Judge is one for life, subject only to the constitutional standard of good behavior (Art. III, Sec. 1). That is a standard to be judged only by the Senate sitting as a Court of Impeachment (Art. I, Sec. 3), not by a court of appeals.

Third. It is significant that when the court below, on the second appeal in the *Hatahley* case, commented adversely on petitioner's conduct, it referred only to incidents at the first trial, which were considered by this Court on the merits, and which were held by this Court not to warrant the Government's stricture of "being influenced by an unwarranted attitude of hostility to the Government's case." See 357 U.S. at 177, note 3, quoted *supra*, p. 3. On the second appeal, the court below referred to no single instance from the second record, indeed to no single word from that source, to justify its suggestion that a judge whose conduct had been specifically approved by this Court as not improper should thereafter step aside. Thus the Court of Appeals was in substance overruling and reversing this Court's determination, made in 1956, that petitioner's conduct of the original trial was not improper.

Here is the pertinent extract from the opinion of the court below on the second appeal (Tr. 19-20; 257 F. 2d at 925-926); the bracketed references are to the record of the first hearing, where this Court reversed the Tenth Circuit's reversal of petitioner's original ruling (No. 231, Oct. T. 1955):

> "A casual reading of the two records leaves no room for doubt that the District Judge was incensed and embittered, perhaps understandably so, by the general treatment over a period of years of the plaintiffs and other Indians in southeastern Utah by the government agents and white ranchers in their attempt to force

the Indians onto established reservations. This was climaxed by the range clearance program, with instances of brutal handling and slaughter of their livestock, which the Court, during trial, referred to as 'horrible' [1R. 223], 'monstrous' [1R. 223, 226], 'atrocious' [1R. 326], 'cruel' [1R. 222], 'coldblooded depredation' [1R. 226], and 'without a sense of decency' [1R. 222]. The Court firmly believed that the Indians were being wrongfully driven from their ancestral homes, and suggested Presidential [1R. 223, 418] and Congressional [1R. 225-226] investigations to determine their aboriginal rights. He threatened to conduct such an investigation himself [1R. 83-85, 276-277, 418]. A public appeal on behalf of the plaintiffs was made for funds and supplies to be cleared through the Judge's chambers [1R. 224, 246-247, 277-278, 281].[6] From his obvious interest in the case, illustrated by conduct and statements made throughout the trial, which need not be detailed further, we are certain that the feeling of the presiding Judge is such that, upon retrial, he cannot give the calm, impartial consideration which is necessary for a fair disposition of this unfortunate matter, and he should step aside."

[6] [Footnote in original] The allowance of $395.00 per head for the Indian horses and burros, and $3,500.00 for mental pain and suffering for their loss, is of itself an indication of the desire of the presiding Judge to assist the plaintiffs for the different wrongs which they had suffered.

If, as the foregoing footnote from the second *Hatahley* opinion appears to indicate, petitioner's award of heavy damages for the unconscionable depredation inflicted on the Indians by the Government's agents reflects such partiality as to justify disqualifying him, by writ of mandamus, from further participation in the case, then by parity of reasoning those judges of the court below who on the first appeal held the United States free from all liability for its authorized representatives' spoliation of the Indian plaintiffs would seem to be similarly disqualified from taking any further action in any phase of the still pending *Hatahley* litigation.

Fourth. The clearest indication that the Tenth Circuit felt doubts as to its power in the premises is found in the circumstance that, although four judges sat en banc to issue the order now sought to be reviewed, the same four judges immediately after hearing arguments on the petition for writ of mandamus convened themselves as a Judicial Council to repeat in different fashion the same direction to petitioner that he disqualify himself.

Since, as we show in the Petition for a common law Writ of Certiorari or in the alternative for a Writ of Mandamus, which is filed simultaneously to review the order of the Judicial Council, that order was utterly devoid of statutory sanction, it can only be concluded that the same judges sitting as the United States Court of Appeals for the Tenth Circuit doubted their unaided power, in that incarnation, to effect the order of disqualification now in question.

CONCLUSION

The order under review strikes at the very heart of orderly judicial administration. This petition for a writ of certiorari should accordingly be granted.

Respectfully submitted.

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MARCH 1960.